

RNIB's response to Ofcom's consultation on EPG accessibility

1. About us

As the largest organisation of blind and partially sighted people in the UK, RNIB is pleased to have the opportunity to respond to this consultation. We are a membership organisation with over 10,000 members who are blind, partially sighted or the friends and family of people with sight loss. 80 per cent of our Trustees and Assembly Members are blind or partially sighted. We encourage members to be involved in our work and regularly consult with them on government policy and their ideas for change. As a campaigning organisation of blind and partially sighted people, we fight for the rights of people with sight loss in each of the UK's countries. Our priorities are to:

- Stop people losing their sight unnecessarily
- Support independent living for blind and partially sighted people
- Create a society that is inclusive of blind and partially sighted people's interests and needs.

We also provide expert knowledge to business and the public sector through consultancy on improving the accessibility of the built environment, technology, products and services.

2. Importance of TV to blind and partially sighted users

Since our Needs Survey in 1991 showed that a large majority of blind and partially sighted people watch television¹, RNIB has taken an active role in highlighting TV access issues. It has worked to try to ensure access to programmes, services and equipment, both by direct work with broadcasters and manufacturers and by influencing legislation and regulation.

¹ RNIB Needs Survey (1991) Blind and partially sighted adults in Britain: the RNIB Survey Volume 1, by Ian Bruce, Aubrey McKennell and Errol Walker

In this digital age, being able to watch TV remains important to blind and partially sighted people. In 2006 Research by the University of Birmingham² found that around 87 per cent of blind and partially sighted people regularly watch TV and videos or DVDs. The media plays an important role in the lives of blind and partially sighted people by providing access to news, information and entertainment.

Research conducted by Access Economics in 2009 found that one in five people aged 75 or over were living with sight loss and this rose to one in two people aged 90 or over³. The research also suggested that by 2050 the number of people with sight loss in the UK would double to nearly four million.

In RNIB's "Update on the inclusive society 2013" report respondents were asked to select from a list of statements about what kind of impact fully accessible television and radio would have on their lives:

- 56% said that it would make them more independent;
- 56% said it would make them happier about life;
- 56% said it would make them feel less socially isolated;
- 51% said it would make them feel better about their sight loss

In addition 68% of respondents selected at least one of these impact statements and 38% selected all four of them.

3. Consultation Response

Q1 (Accessibility features)

Q1(a) Do you agree that EPG providers should use reasonable endeavours to secure so far as practicable that their EPGs include options for users to use all or as many as possible of the following accessibility features: (a) 'text-to-speech', (b) 'filtering or highlighting', (c) 'magnification' and (d) 'high contrast' displays (i.e. with a contrast ratio of no less than 7:1)? If not, please explain why you do not agree giving reasons.

Q1(b) Do you agree with the changes to the EPG Code that we

² Douglas, G., Corcoran, C., Pavey, S. (August 2006) Network 1000: Opinions and circumstances of visually impaired people in Britain: report based on over 1000 interviews.

³Access Economics, July 2009, Future Sight loss UK (1): The economic impact of partial sight and blindness in the UK adult population

propose to make to implement these proposals? If not, please explain why you do not agree giving reasons.

The inclusion of accessibility features such as text-to-speech, filtering or highlighting programs with AD, magnification and high contrast displays will mean greater independence for the 2 million people living with sight loss in the UK and their ability to choose what they want to watch much like the sighted audience do and have done since the launch of digital television in the UK.

Mandating

RNIB is extremely disappointed that Ofcom have failed to mandate the incorporation of accessibility requirements within EPGs as advocated by RNIB in our response to Ofcom's previous consultation. It is incorrect to state that RNIB advocated an "absolute requirement" on EPG providers to ensure the provision of accessibility features. RNIB's response stated that if necessary, the requirement could be made subject to achievability. We believe that this would enable Ofcom to take account, so far as is appropriate, of all the issues that may arise eg control, the position of entry level models and other challenges.

Text to speech was first available on an EPG in 2010 and it has been demonstrated to be the only fully accessible solution without the requirement of additional technology which is often expensive or hard to use. Despite this most television receivers today remain inaccessible and progress has been slow.

It is clear that a directive from Ofcom is required to address this issue once and for all and that Ofcom needs to use the full legal powers conferred on them by the Communications Act if significant progress is to be achieved.

As with the previous consultation document, RNIB does not consider that the current consultation document provides a convincing argument as to why Ofcom cannot require mandating. We are concerned that Ofcom has given insufficient weight to the views and needs of blind and partially sighted people and have prioritised the commercial interests of providers.

This is even more clearly demonstrated in the decision to downgrade the best endeavours requirement to reasonable endeavours.

The difference between best endeavours and reasonable endeavours

We have sought guidance from Ofcom as to how they would interpret best and reasonable endeavours in the context of EPG Accessibility. However, we understand that since this will be considered on a case by case basis no such guidance is available. In the absence of guidance we have considered the use of the terms within commercial law. Although the meaning of the terms may vary, we understand that the terms are generally interpreted as follows:

“Best endeavours

A best endeavours obligation is quite strict. It requires the party to take all reasonable courses of action to achieve the desired result. This includes those within its power which can achieve the desired result, and which a prudent, determined and reasonable person, acting in his or her own interests, and desiring to achieve that result, would take. This may include the party commencing legal proceedings.

This is likely to involve spending money, although there is no rule on how much. However, the party is not expected to spend money that would result in its financial ruin or disregard its shareholders’ interests or breach its duties to them.

Reasonable endeavours

An obligation to use reasonable endeavours is less onerous. The party is required to take just one reasonable course of action to achieve the desired result. In deciding which course to take, the party is permitted to balance its contractual obligation against all relevant commercial considerations. These considerations could include its relationships with third parties, its reputation, likely costs and the chances of achieving the desired result. Most importantly, the party is entitled to consider its own financial interests in deciding how best to comply with this obligation.”⁴

RNIB’s concern with specifying reasonable endeavours is that it fails to require providers to fully explore all practical options for achieving accessibility and to invest resources accordingly. In our view it will allow providers to continue to fail to take action for the very reasons they have specified in their responses to the previous consultation. It will allow providers to make decision as to how much commercial priority they place on accessibility issues, to prioritise which accessibility issues they

⁴ <http://www.nortonrosefulbright.com/knowledge/publications/114750/best-reasonable-and-all-reasonable-endeavours> last checked on 25/01/2018

wish to address (as we have already been asked by one provider), will allow them to choose their own accessibility solution depending on how they view their customer base (see for example Virgin's view that their customer base would prefer a smartphone solution) and will not require them to divert resources away from other parts of their business to address accessibility issues.

We also note that Ofcom's proposal is not just "reasonable endeavours" but "reasonable endeavours to secure so far as is reasonable practicable" which would appear to be a further dilution of the reasonable endeavours requirement. Again the consultation document provides no justification for this addition.

RNIB would also take issue with the suggestion by some providers that reasonable endeavours is akin to the reasonable adjustment requirement in the Equality Act. In our view, the duty to make reasonable adjustments is an objective test of what is reasonable in all the circumstances of a case in order to remove the disadvantage faced by an individual disabled person. Crucially it requires service providers to explore all the options, to take steps to remove the disadvantage not dependent on their own commercial priorities and allows the court to look at the resources of a whole business. In our view the reasonable adjustments requirement is closer to the best endeavours requirement.

Furthermore, if Ofcom hold providers to a lower standard than the legislation, then this not only leaves the Code and Ofcom open to challenge (under, amongst other things, compliance with the Equality Duty) but also could still result in individual litigation against providers for failure to meet the requirements of the Equality Act.

Claims of lack of control over accessibility features

In the consultation document Ofcom express that "...TalkTalk and BT, which use YouView-based boxes, might have to negotiate with other YouView consortium members (BBC, ITV, Channel 4, Channel 5, Arqiva) to secure agreement on a common specification and the sharing of development costs." RNIB notes that all four broadcasters mentioned are public service broadcasters and are therefore subject to the Public Sector Equality Duty (section 149 of the Equality Act) which gives them a duty to "...advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it." To

block the adoption of accessibility features by YouView would reduce equality rather than advance it. The obligations placed on organisations under the Equality Act should be taken into account when determining the standard to which providers will be held.

Arguments of demographic

In their response to the 2015 consultation Virgin suggested that “...those preferring a TTS enabled device currently had the option to use Samsung or Panasonic smart TVs.” and Vodafone claimed the proposed amendments “...would deny the opportunity to offer accessibility features as a unique selling point.⁵” For someone who is unable to use a smartphone a choice between accessibility features they can use, such as a talking EPG, and accessibility features they cannot, such as a companion app, does not constitute a unique selling point since the consumer is not being offered a genuine choice. The implied suggestion from Virgin that users requiring accessibility were welcome to use devices from other manufacturers ignores the fact that any user requiring TTS who is unable to use a smartphone is barred from accessing the Virgin service without convoluted workarounds or sighted assistance. RNIB would remind Virgin of their obligation as a service provider under the Equality Act 2010⁶. It is absolutely clear that a service provider is prevented from justifying a failure to make reasonable adjustments by suggesting that customers would receive a better service elsewhere.

Some respondents appeared to use the ‘chicken and egg’ defence whereby they state that since blind and partially sighted people do not use their service then they should not be required to make it accessible⁷. People will not, and indeed cannot, use a service that is inaccessible to them so this argument equates to arguing that previous inadequate accessibility is a reason to be excused from providing accessibility in future. Again, we believe that such an approach constitutes a breach of the Equality Act.

Innovative solutions

⁵ Consultation document Section 4.15

⁶ <http://www.legislation.gov.uk/ukpga/2010/15/section/29> last checked 12/01/2018

⁷ “...the profile of each company and its product offering needs to be taken into account (Sky, Virgin) in order to prioritise resources to achieve maximum impact for customers with accessibility requirements” Consultation document Section 4.9

In the 2015 consultation some respondents claimed that legislating for in-built Text to Speech inhibits the creation of innovative accessibility solutions. RNIB is not against the development or use of innovative solutions for accessibility as long as there is a genuine accessibility solution. Any technology promoted as the main accessibility solution must be reliable, free and must not raise the complexity of operating the TV.

Reliable means users should be able to expect it to work every time, for every channel without interruption. Free means that there should be no cost to the user. To not raise the complexity of operating the TV means the interface of the accessible solution must not have a steep learning curve and a blind person performing the same action as a sighted person should not have to memorise menu layouts, keep written instructions or use significantly more keypresses.

Current alternative accessibility solutions: smartphone apps and speech driven interfaces.

Smartphone apps are not reliable in that changes to the platform software can break the accessibility and they will cease working. This has been the case with the Sky app which was inaccessible for at least 6 months. Smartphones are not cheap or free to purchase and often come with a monthly contract and regular payment. They also raise the complexity of operating the TV by making it necessary to use screen readers such as Talkback or VoiceOver which are known to have a steep learning curve. A sighted accessibility specialist from the National Federation of the Blind decided to try to control her iPhone exclusively using VoiceOver for 40 days. She found that using VoiceOver to type on a virtual keyboard “is a pain”, that Apple’s speech recognition software, Siri, was inaccurate, the lag between a gesture and speech kicking in “was sometimes seconds” and that using VoiceOver at a comfortable speed required a good memory and good mental map⁸. Once voiceover is turned on the gestures users may require to operate their phones include a ‘three-finger double tap’, a ‘one finger double-tap and drag’ (where the finger is left on the screen and then dragged), a rotor movement (where two fingers are placed on the screen and rotated around their central point) and a pinch command (where two fingers are placed on the screen and moved together or apart to zoom in or out). Talkback on Android has similar gestures. The biggest cause of sight

⁸ <https://nfb.org/blog/atblog/sighted-guide-voiceover> last checked 26/01/2018

loss in the UK is aging and older people are more likely to have manual dexterity issues and will be less likely to be able to memorise new gestures or screen layouts. It is not acceptable to expect these users to learn a range of complex touchscreen gestures to be able to continue to watch TV.

Speech driven interfaces lack the degree of reliability required by an end user for whom this might be the only way to access a service. A speech driven interface would need to be able to understand every command spoken with any accent. Although the reliability of speech driven interfaces has improved significantly in the past few years it is not yet usable as a primary interface (which is what it would be for a TTS user if it is the only accessible interface). RNIB were invited to see a demonstration of voice control of a TV service via an Amazon Echo where the system repeatedly failed to understand the command to change channel given to it by one of the developers. To someone with an alternative method of switching to a named channel this is an annoyance but if this is the only accessible way to switch to a named channel the whole viewing experience is broken.

Q2 (Rolling out to all TV receivers)

Do you agree that the proposed features should be rolled out on all new models of TV receivers commencing development from when the changes to the EPG Code that we are proposing enter into force, and any subsequent models (using reasonable endeavours, so far as practicable)? If not, please explain why you do not agree giving reasons.

RNIB welcomes Ofcom's decision that all television receivers should be made more accessible subject to the above concerns regarding reasonable endeavours. This will potentially mean that cheaper devices in the UK market will need to start including accessibility features.

Blind and partially sighted people are less likely to be in work and Douglas et al found in 2006 that 66% of people registered as blind or partially sighted were unemployed⁹, and therefore would be less likely to afford higher end devices. Currently accessibility features such as text-to-speech are only found in more expensive television receivers and RNIB

⁹ https://www.rnib.org.uk/sites/default/files/Network_1000_Opinions.doc last accessed 12/01/2018

receives complaints from blind and partially sighted people about the lack of sufficient accessibility in smaller and more affordable models. High end televisions tend to be larger devices which means that people buying a TV specifically for the spoken menus still have to buy a larger screen which they then cannot use.

Q3 (Reporting requirement):

Do you agree with our revised proposal to retain and amend paragraph 10 of the current EPG Code, which requires EPG licensees to produce an annual statement regarding accessibility? If not, please explain why you do not agree giving reasons.

In order to ensure progress is being made (and to ensure that credit is given to service providers who improve the accessibility) a reporting mechanism such as an annual statement will be essential. RNIB agree with the changes to the wording.

Q4 (Further changes):

Do you agree with the changes that we propose to make to paragraphs 7, 11 and 13 of the current EPG Code to simplify the Code? If not, please explain why you do not agree giving reasons.

RNIB agree with these changes.

Q5:

Do you agree with our assessment of the impact of our proposals, in terms of the benefits and costs associated with these proposals for consumers, EPG providers, and set top box manufacturers? Please explain the reason for your answer, providing supporting evidence on costs and/or benefits where available.

RNIB cannot comment on the costs to service providers beyond the information we have already supplied on the costs we incurred when provisioning set-top boxes with text-to-speech. We note with disappointment however that the current requirement only being placed on future developments will mean that many of these accessibility features may not appear on the market for several years.

Q6:

Do you agree with our assessment of the impact of our proposals on the relevant equality groups? If not, please explain why you do not agree.

RNIB believes that Ofcom's impact assessment is inadequate as it fails to assess the impact of the failure to mandate and the dilution of the best endeavours requirement etc or whether the requirement to use reasonable endeavours will be effective in overcoming the discrimination that blind and partially sighted people face in their access to TV.

Q7:

Do you have any other comments on our analysis or proposals?

The consultation outlines rules that EPG service providers will need to follow but does not outline what penalties will be applied for providers that do not comply. RNIB would advocate financial penalties for non-compliance including a failure to adequately report progress or lack of progress as well license restrictions in order that the duty to make their EPGs accessible is taken seriously.